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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1030

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-18) is reported at 309 F. 2d 352. The Board's decision and order (J.A. 3-10, 11-53)[1] are reported at 133 NLRB 911.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 1, 1962 (Pet. 13, 19),

[1] "J.A." refers to the Joint Appendix in the court below.

and a petition for rehearing was denied on November 26, 1962 (Pet. 20). On February 1, 1963, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including April 25, 1963 (Pet. 21). The petition for certiorari was filed on April 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner discriminatorily discharged three employees in violation of Section 8(a)(3) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 10-12 of the petition.

STATEMENT

A. The Board's Findings of Fact

In July 1960, the Union[1] began a drive to organize petitioner's plant. In August, Louis Perretta, petitioner's president, asked Benjamin Cross, an employee, what he knew about the Union. When Cross, who had joined the Union in July, said he knew nothing, Perretta said: "You know, you are in the Union. You know more than you tell me. What

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[1] Local 52, Amalgamated Lithographers of America.

about Pat [Case] and Marlboro Joe [Pellizzari]. Aren't they in the Union?" Cross said he did not know whether Case and Pellizzari were union members, but Perretta declared: "You must know, you attend meetings." (J.A. 12, 19; 57, 105-106).

On Saturday afternoon, September 10, the Union conducted a meeting at which Case distributed cards to fellow employees in attendance. Peter L'Episcopo, petitioner's night-shift supervisor,[1] attended the Union meeting and observed Case's distribution of the cards (J.A. 34; 59-61). At work that evening, L'Episcopo asked employee Dietz, with whom he had spoken at the meeting, whether another employee had attended the meeting. That same evening L'Episcopo spoke to several employees, including Pellizzari, about union activity at the plant (J.A. 18-19; 87-88, 151, 162, 170-171). In Louis Perretta's presence, L'Episcolo told Pellizzari, who denied being in the Union, that he knew Pellizzari was lying and that Pellizzari "would move up faster" and "would be better off not being in a union shop" (J.A. 18-19; 151). President Perretta then pounded his fist on the table and said that he did "not want the * * * union in the shop" (J.A. 33-34; 151).[2]

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[1] The Board found (J.A. 16-17) that L'Episcopo was a supervisor within the meaning of the Act, which finding was sustained by the court below (Pet. 13, n. 1).

[2] Also on September 10, Louis Perretta asked employee Filoia whether he had joined the Union and asked employee Dave Brown whether he had gone to the Union meeting (J.A. 19-20; 84-85, 161-162). On Monday, September 12, Perretta ascertained from employee Salvatore Pace that

General Manager Frank Perretta, Louis Perretta's son, discharged Pellizzari on Tuesday, September 13, allegedly for breaking petitioner's no-smoking rule (J.A. 33; 151). That same day, after lunch, Louis Perretta pointed to Cross and remarked: "There is the guy that called me up begging for a job * * * * I hired him and he's joined the Union * * * that's all right, he can get a job some place else" (J.A. 4, 19, 31; 108). At the end of the shift, Frank Perretta told Cross that his father was tired of looking at him and discharged him (J.A. 30; 109).

Although Pellizzari had smoked in the plant for many years, so had other employees, including the representatives of management. Moreover, Pellizzari had been complimented on his work during the summer of 1960 and told that he was getting a seven dollar raise. (J.A. 32, 33; 148-149, 67-68, 109, 150, 460, 165, 171-172). Similarly, although Cross had come to work with a "hangover" on September 13 and had a history of taking days off and coming in late, he was permitted to work the entire shift on the thirteenth and was not discharged until after Louis Perretta had referred to his union membership (J.A. 30-32; 107, 118-120).

On September 15, Supervisor L'Episcopo told Patrick Case, "Louis knows you're in the Union, you

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Pace had joined the Union. A few days later, Perretta asked Pace to name any employee "who was enrolled in the Union" and particularly to tell him "who the organizer was" (J.A. 20; 174). Late in September, Perretta asked employee Critelli whether Cross had tried "to get [him] into the Union" (J.A. 20; 145-146).

should go up and tell him that you were in the Union, you realize it was a big mistake but you thought it was right at the time. When you tell him, you'll be back in his good graces." (J.A. 19; 61.) Case ignored this advice and the next day Louis Perretta said to him, "We don't want you around here, we don't need you around here anymore." Case collected his tools and, as he was leaving the plant, Perretta called after him "The next time I meet you, kid, you better be a strong-arm * * * You were a strong-arm last night and you were a strong-arm when you handed out those papers" (J.A. 35; 63). The night before Case had had an altercation with Louis Perretta in a restaurant (J.A. 35; 62-63). The references in Perretta's remarks were to this quarrel and to Case's distribution of membership cards at the Union meeting on September 10 (J.A. 36).

Petitioner discharged 13 employees between September 13 and 28, 1960. Ten of the discharged employees were union members (J.A. 57-58, 204, 253, 269). When asked late in September why so many union members had been discharged, General Manager Frank Perretta told a group of employees: "Yeah, yeah, they are in the Union. Why? Do I have to fire you too? Are you in the Union?" (J.A. 21; 207).

B. The Board's Conclusions and Order

The Board found that petitioner violated Section 8(a)(1) of the Act by threatening the employees with job loss for having joined the Union, by promising them benefits if they abandoned it, and by co-

cively interrogating employees concerning their union membership and activities (J.A. 18-22). The Board further found that, while good cause existed for the discharges of Cross, Pellizzari and Case, the discharges were not motivated by this consideration but by the employees' union activity, and thus violated Section 8(a)(3) (J.A. 4-5, 30-37).

The Board's order (J.A. 6-8) requires petitioner to cease and desist from the unfair labor practices found, and from in any other manner infringing its employees' rights under the Act. The order also requires petitioner to reinstate Cross, Pellizzari and Case with back pay, and to post an appropriate notice.

C. The Decision of the Court of Appeals

The court of appeals concluded that the Board's findings were supported by substantial evidence and enforced the Board's order in full (Pet. 13-18).

ARGUMENT

The sole question presented is whether the Board's findings that petitioner discharged employees Cross, Pellizzari and Case because of their union activity rather than because of their employment deficiencies, is supported by substantial evidence on the record as a whole. The court of appeals, after a careful analysis of the record (Pet. 13-18), concluded

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The Board's complaint had charged that petitioner had illegally discharged eight employees (J.A. 12), and the trial examiner had held that four of them had been discharged for their union activities (J.A. 22-46).

that the Board's findings were so supported. The correctness of this factual determination presents no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

The court of appeals applied the proper standard of review. It is not the function of the reviewing court to reweigh the evidence or to "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. at 488. The court's function is simply to determine whether the credibility determinations made and the inferences drawn by the Board are reasonable, "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Ibid.* See also, *National Labor Relations Board* v. *Walton Manufacturing Company*, 369 U.S. 404, 405. The court below, in stating its conclusion regarding the substantiality of the evidence negatively rather than affirmatively,* was not, as petitioner suggests (Pet. 8-9), abdicating its reviewing function, but was merely emphasizing that its task was not to reweigh the evidence *de novo*. For, although the court did not reweigh the evidence, a reading of its entire opinion shows that it meticulously examined the record and

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* The court stated (Pet. 18): "we have carefully reviewed the whole record and on the basis of that record we cannot say that the Board's findings *are not* supported by substantial evidence" (emphasis added).

satisfied itself that there was rational support for the Board's findings. Similarly, the failure of the court to allude to the evidence relied on by petitioner does not mean (Pet. 4-8) that it was overlooked, but only that the court concluded that the Board was warranted in finding that it was outweighed by the other evidence in the record.[7]

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[7] The two excerpts from Case's testimony on cross-examination relied on by petitioner (Pet. 5) are not so unequivocal as to constitute a retraction of his testimony on direct examination which the Board credited (cf. J.A. 63 with J.A. 75, 79). The fact that Cross, in his pre-trial affidavits, did not mention everything that he later testified to at the Board hearing (Pet. 6), was evaluated by the Examiner and found not to affect his credibility (J.A. 31-32). Finally, there is nothing in the Board order which immunizes Pellizzari against discharge for smoking (Pet. 7). The Board found, and the court below agreed, that Pellizzari was not discharged because of his smoking, but because of his union activity, and the Board's order merely prohibits a discharge for the latter reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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